US Army Corps of Engineers

# Construction Bulletin

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**CEMP-C**

**Subject:** Latent Defects

**Applicability:** GUIDANCE

1. This construction bulletin is to provide policy guidance on the issues related to latent defects discovered on our construction projects. We owe it to our customers to pursue cases of latent defects and to make sure that corrective actions are taken. However, when an alleged latent defect is discovered the burden of proof rests with the government in proving that in fact this is a latent defect caused by the original contractor. Therefore, the responsibility for pursuing a case of a latent defect belongs to us as an organization.

2. Unless otherwise stated in the contract, such as through a warranty clause, the government loses all remedies against the contractor after acceptance of a project, except for latent defects, fraud, or gross mistakes amounting to fraud. If, after acceptance, the government discovers latent defects, it may revoke acceptance and exercise its right to apply preacceptance remedies provided in the Inspection Clause.

3. What is a Latent Defect? - Latent defects are defects in workmanship or materials, existing at the time of acceptance of a project, which are not discoverable by a reasonable inspection. Establishing that a latent defect exists is dependent upon the following four criteria:

a. There must be a defect; that is, the contractor must have failed to construct the work in accordance with the plans and specifications. If the problem resulted from a defective government design, then the government cannot recover on the basis of a latent defect.

b. The defect must have existed at the time of acceptance. The defect must not have been caused by events after acceptance, such as from improper operation or maintenance of the facility by the user.

c. The defect must have been the cause of the failure. Where a malfunction could have resulted from more than one cause, the government must prove that the malfunction is attributable to the latent defect.

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d. The defect must not have been discoverable with a reasonable inspection prior to acceptance. The government must establish what a reasonable inspection is and why it would not have disclosed the defect. The failure to make a reasonable inspection that would have disclosed the defect is fatal to a latent defect allegation. If a defect is detectable by a visual inspection, a reasonable inspection would have discovered it, and generally the defect would then not be latent. If the contract specifies a test that would have uncovered the defect and the government failed to perform the test, the defect is not latent.

4. The effect of a latent defect is to remove the conclusiveness of final acceptance, thereby entitling the government to the same remedies it would have if acceptance had not yet occurred. This includes costs of correcting defects, costs of correcting damage done by the defects, and extra costs of inspection that were consequences of the contractor's failure to follow the contract specifications. Generally, the contractor is liable for latent defects discovered at any time after acceptance, to include periods after the expiration of a warranty clause. A warranty is an additional remedy to the preacceptance remedies provided by contract provisions.

5. Our responsibility under the warranty and latent defect provisions of the contract requires that when defects are identified, that corrective actions be pursued to resolve the problem. If, upon investigation of a problem, the determination is made that it was caused by a latent defect in the construction, discussions should be opened with the contractor to effect a timely solution to the problem. The contractor should be afforded the opportunity to replace, and/or correct the defective portion of the work and to perform this work prior to the government seeking alternative remedies. Where the Government asserts that the work contains a latent defect after acceptance, the Government's remedies under this clause should take into consideration the reasonably expected useful life of the facility or contract work. If the contractor is non-responsive, he should be put on notice that the government may take other actions to correct the work, such as informing the surety, correcting the work itself, or obtaining another contractor to perform the required work. Should issues of responsibility be raised during negotiations, and resolution of the negotiations become inconclusive, then Alternative Dispute Resolution (ADR) should be considered as a method to solve the problem. We owe our customers and the users of our projects the appropriate corrective actions to resolve these deficiencies in the most expedient manner possible.

6. This construction bulletin has been coordinated with the Office of the Chief Counsel (CECC-C), the Office of the Principal Assistant Responsible for Contracting (CEPR-ZA), and the Operations, Construction and Readiness Division of the Civil Works Directorate (CECW-OC).

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